Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-615

CONSUMER ENTERPRISES, INC.,
Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF.

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This reply brief meets the new arguments of Respondent that this Court lacks jurisdiction because the Preliminary Injunction from the intermediate State Appellate Court is not a final order; and that a related writ involving essentially the same questions has already been denied by this Court. Petitioner replys that the Preliminary Injunction in the present case is truly final to warrant review, the United States Supreme Court having recognized the finality of such situations in other cases; and that the matter of the related writ still remains before this Court because a Petition for Rehearing has been filed.

REPLY ARGUMENT.

I. Finality Characterizes the Judgment Below.

There is no factual contention as to any *ultimate fact* in Respondent's verified complaint. Petitioner has always admitted

that it sells patches bearing illustrations of the member clubs of the National Football League. There are no other ultimate facts pleaded in the verified complaint, and Petitioner has admitted such ultimate fact by failure to answer the verified complaint. If this Court does not grant the Petition to review the controlling federal law, then Petitioner has no further defense in view of the *legal conclusions* cited in the verified complaint and adopted by the Courts below. While Petitioner admits the ultimate facts pleaded, it does not admit the factual and legal conclusions, and the failure to answer the verified complaint is not an admission of Respondent's legal conclusion. *Carlton et al.* v. *Smith et al.*, 285 Ill. App. 380 (1936); *Delta Die Casting Company* v. *Village of Schiller Park*, 17 Ill. App. 2d 543 (1958); and *Skolnick* v. *Nudelman*, 71 Ill. App. 2d 424 (1966).

Respondent cited in support of its argument the Supreme Court case of *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U. S. 178; but this Court expressly declined to follow the *Montgomery* authority in the later case of *Local No. 438* v. *Curry*, 371 U. S. 542. The Court in the *Curry* case noted that the *Montgomery* decision preceded the labor *preemption* cases. Petitioner herein also relies on federal preemption in protecting its right as a member of the public to use what is in the public domain under the preemption doctrines announced by the U. S. Supreme Court in the cases of *Sears, Roebuck & Co.* v. *Stiffel*, 376 U. S. 225; and *Compco Corp.* v. *Day Brite Lighting, Inc.*, 376 U. S. 234.

Further, the *Curry* Court noted that the situation was similar to the U. S. Supreme Court decision in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379 wherein the Court noted that for all practical purposes the litigation in the State Courts below was terminated, since there was nothing more of substance to be litigated in the trial court (see the *Curry* decision, page 521, footnote 8). Similarly, Petitioner herein asks that this Court

forestall the erroneous application of the *legal and factual conclusions* which will leave Petitioner without defense.

The temporary injunction involved in the present case is final without provision for modification (see Appendix Al to Petitioner's brief). Such an injunction has been in force since December 22, 1972, and it has finally and substantially affected Petitioner's rights to date. This Court considered it appropriate to review such a "temporary" injunction issued by an Illinois court before, *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 91 S. Ct. 1575 (1971). On page 419, footnote 1, the Court stated:

> We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights. Although the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide this case. (citing cases.)

See also *Amalgamated Food Employees' Union Local 590* v. *Logan Valley Plaza*, 391 U. S. 308, 88 S. Ct. 1601 (1968), page 1605, footnote 5:

> We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forthcoming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. (citing cases.)

II. The Ultimate Facts Pleaded by Respondent Do Not Support the Injunction.

Respondent's opposition brief listed paragraphs of its verified complaint in its Appendix at A1.

The ultimate fact of Paragraph 8 is admitted as true by non-answer of Petitioner.

Factual and legal conclusions characterize Paragraph 11 with respect to associating member clubs with articles licensed to third parties by Respondent, and attributing sponsorship to such articles; but such paragraph is irrelevant to the determination whether the admitted ultimate fact of Petitioner's sales of patches with illustrations are an infringing use of trademarks or mere copying of what is in the public domain.

The ultimate fact of Paragraph 19 is admitted, that is, the sale by Petitioner of patches being trademark illustrations; but the *conclusion* that such act infringes Respondent's trademark rights is not admitted by not answering the verified complaint.

The legal conclusions of Paragraph 26 regarding passing off, sponsorship and confusion as to source is not admitted. As shown, failure to answer admits only ultimate facts, not conclusions. No ultimate facts were pleaded to show that Petitioner attempted to palm off, as by using language on its packages or with its promotions which would represent the patches as being approved or originating from any member club of the N. F. L.

III. The Petition Should Be Granted in View of a Related Petition for Rehearing Directed to the Same Essential Question.

Petitioner was unaware that this Court had denied a Petition for Writ of Certiorari to the 5th Circuit in the case of *Boston Professional Hockey Association, Inc. et al.* v. *Dallas Cap & Emblem Mfg. Inc.* (Docket No. 75-156). Petitioner

herein maintains that the same essential questions are involved, and it likewise involves the same essential federal question of whether a party can reclaim from the public that which has been dedicated. Similarly, the major question of federal preemption is involved and a request is made that this Court not permit trademark strawmen to be erected to recapture dedicated subject matter. Petitioner herein has recently learned that the Petitioner in the *Dallas Cap* case has filed a Petition for Rehearing on October 29, 1975, in which attention of the Court has been directed to the instant Petition and the common major question which requires resolution by this Court. To date, Petitioner believes the body of law permitted its use of illustrations which are in the public domain, even though such illustrations may be used otherwise by others as service marks for entertainment services. It is understandable that numerous other persons would look to this Court for resolution and affirmation of their right to use similar illustrations *which are in the public domain.*

Respectfully submitted,

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